**Harper Packing Company, Inc. *and* Harper Packing Employees Association.** Cases 4–CA–19573, 4–CA–19789, and 4–CA–20097

February 17, 1993

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On April 8, 1992, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified below.

1. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with employees regarding proposed midterm contract modifications to a bargaining agreement effective July 1, 1989, to December 31, 1991. Because, as explained below, the employees with whom the Respondent dealt were de facto representatives of the Union, we adopt the judge's conclusion that the Respondent did not violate Section 8(a)(5) and (1).

The Union is an independent and unaffiliated labor organization. The General Counsel contends that the Respondent failed to submit contract proposals to the Union and, instead, bypassed its officers and dealt directly with unit employees. The initial act of direct dealing alleged to be a violation occurred in October 1990, when the Respondent gave employee William Wooters a list of ''minimum requirements'' to modify the contract. Thereafter, in January 1991, the Respondent executed a modification agreement with three employees from the unit, none of whom held office in the Union.

Contrary to the General Counsel, we find that the Respondent did not bypass the Union's officers. We reach this conclusion because the record shows that the Union's officers were laid off and, once laid off, did not seek to participate in negotiations and were not replaced by the Union. Thus, by October 1990, when the General Counsel contends the Respondent's unlawful direct dealing commenced, both the Union's president and its vice president had been laid off. These layoffs occurred in May and June 1990. No new union officers were named to replace them. After their layoff, the only union officer remaining was Secretary-Treasurer John Horne.

In July 1990, the Respondent dealt with Horne regarding proposed modifications to the existing contract. It asked Horne to have two employees assist him at the next discussion inasmuch as Horne was the only remaining union official. Horne selected employees William Wooters and Steve Van Horn. Thereafter, Wooters and Van Horn actively participated in contract negotiations. In September 1990, Horne was laid off and ceased direct participation in the negotiations. As with the previously laid-off union officers, Horne too was not replaced as a union officer. By January 1991, when an agreement was executed, both Wooters and Van Horn had ceased participation in negotiations. In their place, unit employee Tom Gaskill became the spokesman for the employees. In January 1991 Gaskill and two other unit employees signed the contract modification agreement. There is no evidence that any union officer, once laid off, sought to participate in negotiations or that any employee other than Gaskill sought to act as a spokesman for the employees in January 1991 when the contract was signed.

In these circumstances, it appears that as of October 1990, when the complaint alleges the initial act of unlawful direct dealing occurred, there were no union officials with whom the Respondent could deal. As a practical matter, its only recourse was to deal with individuals effectively designated by the last remaining union official. Thereafter, the Respondent simply continued to deal with individuals who purported to act in a representative capacity, as no union officers remained and no new union officers formally had been designated. In short, on these facts, neither the Union nor any of its officers were ''bypassed.'' Accordingly, the Respondent did not deal directly with employees commencing October 1990 in violation of Section 8(a)(1) and (5).

2. The judge found that the Respondent violated Section 8(a)(1) by interfering with the right of employees to seek legal counsel, by inquiring into the Union's internal affairs, by threatening employees with plant closure and layoff, and by linking an employee's recall from layoff to acceptance of a bargaining agreement.[1] Because we find that two other 8(a)(1) allegations that the judge dismissed are factually intertwined with violations of Section 8(a)(1) that he found, we reverse the judge in the following respects.

In January 1991, Coowner Gerald Farrell, in violation of Section 8(a)(1), told employee Wooters that laid-off employee Van Horn would not be recalled from layoff until the Respondent's proposed midterm modifications to the collective-bargaining agreement were accepted. In mid-January 1991, Wooters had a conversation with the Respondent's plant manager,

[1] The Respondent filed no exceptions to these unfair labor practice findings. In finding that the Respondent violated Sec. 8(a)(1) when Plant Manager Dave Smalley threatened an employee with reprisals on about October 3, 1990, the judge inadvertently attributed the testimony of employee William Wooters to employee John Horne.

Dave Smalley, in which Van Horn's status was again discussed. Wooters told Smalley on this occasion that a ''legal problem'' had arisen with respect to proposed modifications to the bargaining agreement. According to Wooters' credited testimony, Smalley became upset and, in reference to Van Horn, ''told me that son of a bitch was not walking into the plant Monday morning'' as part of the proposed agreement. Later that day, Smalley approached Wooters' work station. According to Wooters, Smalley was still upset and told him that after Wooters finished his duties that day he ''no longer had any work for me.''

The complaint alleges that the Respondent violated Section 8(a)(1) by Smalley's threatening not to recall Van Horn and by his threatening that Wooters would be laid off. The judge found there was no violation because Wooters did not state to Smalley that the proposed agreement was wholly unacceptable. The judge also found that the ''legal problem'' purportedly was later resolved with Coowner Farrell.

Contrary to the judge, we find that Smalley's remarks regarding Van Horn's recall were coercive in light of Farrell's unlawful statement earlier that month conditioning Van Horn's recall on execution of a bargaining agreement, the same subject matter that precipitated Smalley's threat not to recall Van Horn. Similarly, Smalley's telling Wooters later that day that the Respondent no longer had any work for him—while Smalley was still visibly upset about the contract and Van Horn—was an implicit threat to lay off Wooters for raising Van Horn's proposed recall. Accordingly, we find that Smalley's remarks to Wooters violated Section 8(a)(1).

On January 25, 1991, Van Horn was recalled. The Respondent filed no exceptions to the judge's finding that commencing May 23, 1991, the Respondent violated Section 8(a)(3) and (4) when it subjected Van Horn's work to increased scrutiny, without justification, because of Van Horn's involvement in filing unfair labor practice charges. Thereafter, on July 22, 1991, Smalley told Van Horn that his work production on the ''IAC machine'' was not fast enough and that he would be suspended if that continued. The complaint alleges that Smalley's threat of suspension violated Section 8(a)(1). The judge found no merit to this allegation because, in the judge's view, Van Horn admitted to ''some kind of malperformance in production'' and, therefore, the Respondent was privileged to tell Van Horn that continued substandard performance might result in discipline.

Van Horn testified that his production on the IAC machine was low because he was having problems with the machine and that when Van Horn explained this to Smalley several days later, Smalley was satisfied with his explanation. Van Horn testified that, notwithstanding his explanation, Smalley scrutinized his work even more closely after that. Van Horn also testified that it was not the normal practice for an employee to be threatened with discipline before he was given an opportunity to discuss the reason that his production on a machine was low.

In this context, it appears that Smalley's threat of suspension on July 22, 1991, was intimately connected to the unlawful increased scrutiny of Van Horn's work which commenced in late May. We note that Van Horn testified not that his performance was ''substandard,'' as the judge found, but that ''problems with the machine'' caused him not to meet the required production standard, a fact that Smalley later acknowledged, according to Van Horn. Further, the immediate threat of discipline, without further discussion, was contrary to past practice. Accordingly, we find that Smalley's threat violated Section 8(a)(1).

3. The complaint alleges that the Respondent violated Section 8(a)(3) and (4) by issuing layoff notices and laying off employees in order to force employees to accept midterm contract modifications and to retaliate against employees for filing unfair labor practice charges.[2] In adopting the judge's dismissal of these allegations, we note that for a period exceeding 1 year before the allegedly unlawful layoffs, the Respondent lawfully reduced its work force by about two-thirds for nondiscriminatory reasons. Thereafter, the Respondent implemented periodic layoffs when work became unavailable for particular employees.

According to the credited testimony of Plant Manager Smalley, the Respondent was unable to plan its workload more than 1 week at a time because it had no real backlog. When it had no work available on a particular machine, the Respondent was required to schedule a layoff, which often was short term and temporary until work became available. Employee Wooters testified in this regard that, because of the reduced employee complement, each employee was uniquely suited for the requirements of his particular job, and there was very little overlap in skills. Accordingly, in view of the Respondent's background of economically motivated layoffs and the frequent absence of available work on a particular machine, we agree with the judge that, notwithstanding the Respondent's commission of other unfair labor practices, the evidence does not establish that the layoffs violated Section 8(a)(3) and (4).[3]

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[2] The Respondent filed no exceptions to the judge's findings that it violated Sec. 8(a)(3) and (4) by subjecting the work of employees William Wooters and Steve Van Horn to increased scrutiny. In his Conclusions of Law, however, the judge inadvertently omitted the 8(a)(3) violation. We have modified the Order and notice to reflect these violations.

[3] The judge found no evidence of antiunion animus. In light of the 8(a)(1) conduct found by the judge and herein, we disagree. However, for the reasons stated above, we agree with the judge that the layoffs were not unlawful.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Harper Packing Company, Inc., Bridgeport, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

''(c) Threatening employees with plant closure, layoff, refusal to recall from layoff, or discipline for not meeting production quotas, because employees have exercised their rights under the Act.''

2. Substitute the following for paragraph 1(e).

''(e) Changing employees' working conditions because they gave testimony to the Board and supported the Association.''

3. Substitute the attached Appendix A for that of the administrative law judge.

## APPENDIX A

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interfere with the right of employees to seek legal counsel.

WE WILL NOT inquire into the internal affairs of the employees' Association.

WE WILL NOT threaten employees with plant closure, layoff, refusal to recall from layoff, or discipline for not meeting production quotas, because employees have exercised their rights under the Act.

WE WILL NOT link an employee's recall from layoff to acceptance by the employees of a collective-bargaining agreement.

WE WILL NOT change the working conditions of employees because they gave testimony to the Board and supported the Association.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the change in working conditions for William Wooters and Steve Van Horn.

HARPER PACKING COMPANY, INC.

*Dona Nutini, Esq.*, for the General Counsel.
*Gerald Farrell*, pro se, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. These consolidated cases were tried before me at Philadelphia, Pennsylvania, on November 20 and 21, 1991, on complaints[1] by the General Counsel alleging generally that Harper Packing Company, Inc. (the Respondent or the Company) violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act.

All parties were given the opportunity to call, to examine and cross-examine witnesses, and following the hearing, to submit briefs. On the record as a whole,[2] including my observation of the witnesses, briefs, and arguments, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

It is alleged, admitted, and I find that the Respondent annually sells and ships products valued in excess of $50,000 directly to points outside the State of New Jersey. I therefore conclude that the Respondent's business meets the Board's jurisdictional standards and it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is further alleged, but denied, that Harper Packing Employees Association (the Union or the Association) is a labor organization within the meaning of Section 2(5) of the Act. Since severing its affiliation with the United Steelworkers of America in the mid-1970s, the Association has negotiated three collective-bargaining agreements with the Respondent covering a unit of production employees. Each bargaining unit employee is a member of the Association and pays dues equal wages for 1 hour each month, and this is remitted to the Association's secretary-treasurer. Other officers of the Association are the president and vice president; however, it does not have regular election of officers, nor have the incumbent president and vice president been replaced notwithstanding that they had been on layoff for nearly a year and a half at the time of the hearing. There is no evidence that the Association has a constitution or bylaws. The Association uses the services of an attorney for grievances, and limitedly, during the contract negotiations considered here. (The attorney did not appear in this case on behalf of the Association.)

Under the test of *Cabot Carbon Co. v. NLRB*, 360 U.S. 203 (1959), the Association is a labor organization within the meaning Section 2(5) of the Act. However, unlike more formal labor organizations, the Association really does not have institutional existence apart from the active employees in the bargaining unit. It is an association of production employees who bargain collectively.

#### II. THE FACTS

The Union has been the bargaining representative of a unit of the Respondent's production employees since 1967, at first under the auspices of the United Steelworkers of Amer-

[1] At the hearing it was represented that the issues in Case 4–CA–19789, related to profit-sharing distributions, had been resolved. Accordingly, the complaint in that case was dismissed.

[2] Errors in transcript have been corrected.

ica, and subsequently as an independent organization. The Company and the Union have been parties to successive collective-bargaining agreements, including the one pivotal here, effective from July 1, 1989, through December 31, 1991.

Some of the significant events in this matter occurred more than 6 months prior to the first charge being filed.[3] Specifically, as a result of the general downturn in the economy, from January 1989 through the first 6 months of 1990, the Respondent laid off about two-thirds of its employees. Thus the bargaining unit went from about 30 to 11 and the office employees from 19 to 6. By January 1991, the bargaining unit was further reduced to seven. Among those no longer employed were Association President Mark Pedon and Vice President Ed Emery.

While the contract provided that employees would be entitled to recall based on seniority for 18 months, it appears that those who were laid off as a result of the force reduction were no longer considered employees. They apparently could continue as members of the Association, but there is no evidence that any did so, by paying dues or otherwise. Though sketchy, the record supports the conclusion that Pedon and Emery, as well as others similarly laid off, were no longer employees as of the time of the events here.

In addition to the general reduction of the work force, William Wooters, one of the bargaining unit members, testified that the Company would lay off employees when there was no work. And this, according to the generally credible testimony of Plant Manager Dave Smalley, was increasingly the situation throughout 1990. The Company often did not have a backlog of orders, thus finding itself in a position where there was no work to be done on a particular machine. In those cases, that machine operator would be given a 3-day notice (as required by the contract) of his layoff. If work came in, the layoff would be canceled.

At a grievance meeting in May 1990, unrelated to the events here, Gerald Farrell (one of the Company's owners) told the Association representatives, Attorney Fred Gross and secretary-treasurer John Horne, that he could not afford the current contract. According to Horne's testimony, Gross replied that he would have no problem negotiating a modification, however he would need to look at the Company's books; and in any event, due to his schedule, he would not be available until September. Horne testified that Gross made essentially the same statement in a meeting of July 13 with Farrell.

In late June 1990, Smalley told employees that Farrell wanted to talk to them. Farrell gave each of the 11 employees a copy of a proposed collective-bargaining agreement, and he told them that he had to ''restructure'' the agreement with the Union in order to be more competitive. He also told them that getting a more competitive contract was necessary in order to make it worth his while to solicit business, and he wanted to have the new contract signed by July 1. Thereafter Farrell and the employees made proposals and counterproposals and ultimately agreed to a new contract which was signed by three bargaining unit employees to be effective from January 17, 1991, through December 31, 1992.

[3] The charge in Case 4–CA–19573 was filed on February 14, 1991. The charge in Case 4–CA–20097 was filed on September 24, 1991.

The agreement in effect which Farrell wanted to restructure provided that it ''can only be modified in writing signed by the Chairman of the Board of the company and the President of the Association.'' Pedon, who was the Association president, was laid off in June 1990 but was not replaced as the president. Though approval of the new contract was unanimously agreed to by the remaining bargaining unit employees, it appears that the Respondent's failure to deal through Pedon is the basis of the direct dealing allegation; and the General Counsel contends that Pedon's failure to sign the new contract renders it void, though validity of the contract is not an issue in this matter.

In any event, Farrell sought relief from what he considered the excessive economic burdens of the collective-bargaining agreement, and which the employee witnesses agreed was lucrative. And after 6 months of discussions, among employees and between them and Farrell, a new agreement was reached. It is in this context that the allegations of Case 4–CA–19573 arose. The allegations in Case 4–CA–20097 relate to events occurring in 1991 after the Association filed the initial charge.

One economic item in the old contract (and presumably a significant one) was: ''Effective January 1, 1991, all members of the Association will receive an 8 percent (8%) increase in hourly wages.'' In his initial proposal, Farrell had no provision for a wage increase in 1991 or any subsequent year through its 5-year term. The Association's response provided for ''a 4% raise Jan 1, 1991 and 3% Jan 1, 1992.'' Farrell countered with a statement entitled ''Minimum Requirements for Contract'' in which he wrote: ''No pay raise January 1, 1991.'' Subsequently he proposed, ''2% raise January 1, 1991, 3% January 1, 1992.''

Curiously, in final contract signed by three members of the Association and Farrell and Smalley for the Company, there is this language: ''Effective January 1, 1991—All members of the Association will receive an eight percent increase in hourly wages. Effective January 1, 1992 all members of the Association will receive a three percent wage increase.'' It is unexplained why Farrell agreed to a 1991 wage increase identical to that provided in the contract which he wanted modified and one substantially in excess of that which the employees had demanded in negotiations.

Farrell's agreement on wages tends to negate the General Counsel's premise that he sought to force employees to accept a contract modification with substantially reduced benefits.

## III. ANALYSIS AND CONCLUDING FINDINGS

### A. *The Alleged Violations of Section 8(a)(5)*

Principally this case is about Farrell's efforts to modify the collective-bargaining agreement he had with the Association. Farrell told his employees that the Company could not be competitive unless some substantial changes were made, and the employees agreed. There was no testimony that any employee objected to some modification of the contract. Thus, when Farrell presented his proposal in late June 1990, the employees began to discuss it and shortly gave Farrell their counter. Further, Farrell presented his proposal to all the active employee members of the Association and, so far as can be ascertained from this record, they all participated in the discussions.

That Farrell wanted a revised contract was mentioned to the Association's attorney in May, during an unrelated grievance matter, and he said he would have no objection but would want to look at the Company's books. However, he also said he would not be available until September. Though he stated this again in a meeting of July 13 also unrelated to the contract discussions, there is no indication that the attorney was brought into the negotiations or that any member of the Association suggested that he should be. On two occasions, to be discussed infra, an employee said he wanted to check with the attorney. While the employees undertook to negotiate without outside counsel, they did consult with him; and, I conclude, from at least July 13, he knew that Farrell was negotiating a proposed midterm modification with the employees.

The General Counsel has alleged a violation of Section 8(a)(5) based on undermining the Association's status as the bargaining representative by direct dealing with employees. However, this is not alleged to have occurred until October 1990 and subsequently. In fact, Farrell began dealing with employees in June, and by July negotiations for a modified contract were well underway. Thus, at the time the General Counsel alleges there was direct dealing, the negotiation posture between the Company and the employees had been set and this was known to the Association's attorney.

If the Respondent's activity with regard to dealing with employees concerning modification of the contract constituted an unfair labor practice, such occurred more than 3 months before the time alleged in the complaint. However, had Farrell's dealings with employees been alleged as of the time he first began dealing with them, such would have been susceptible to the defense of time bar under Section 10(b). Had that been the case, notwithstanding that the activity was continuous, no violation could have been found. *Continental Oil Co*., 194 NLRB 126 (1971). Since the allegation of direct dealing is based on continuation of activity which began more than 6 months prior to the charge being filed, the reasoning of *Continental Oil* applies. If what the Respondent did prior to August 14, 1990, was not an unfair labor practice, a continuation of the same activity subsequently cannot be found a violation of the Act.

Beyond that, since Farrell dealt with all the bargaining unit employees without objection, and since these employees are coextensive with the Association, I conclude there was no direct dealing. As noted above, this Association does not have an independent existence apart from the bargaining unit employees. While an individual who is no longer an employee, can be a member of the Association, and even an officer, in practice the Association includes only those actively employed or on a short layoff.

This is not a situation where the representative of employees was bypassed by the employer, which is violative of Section 8(a)(5). E.g., *Gentzler Tool & Die Corp*., 268 NLRB 330 (1983). To the contrary, the employer dealt collectively with the entire bargaining unit. Thus, even if Farrell was bound to deal only with officers of the Association, this requirement could be waived. I find it was, since the entire bargaining unit participated in the negotiations. Those cases involving direct dealing cited by counsel for the General Counsel are therefore inapposite.

In October, during the course of negotiations, Farrell gave the employees a list of his stated minimum requirements for a new contract. This is alleged in paragraph 9(a) of the complaint to be an 8(a)(5) violation. I disagree. If, as I conclude, it was not unlawful for Farrell to bargain with the employees, it cannot have been unlawful for him to state his position, which he did in various forms. First he presented a proposed contract. There were negotiations, then he presented his minimum requirements. Further, he in fact backed off some of his demands, and, as noted, apparently agreed to pay raises in 1991 and 1992.

It is alleged in paragraph 9(b) that in January 1991 Farrell bypassed the Union and dealt directly with employees by stating that unless they agreed to his midterm modifications and signed a contract, he would not seek new customers. This allegation is in the nature of a threat rather than a breach of Farrell's bargaining obligation. As noted below, Farrell did make statements along those lines to employees and is a repeat of what he said when he told them he wanted a midterm modification of the contract. In the context of these facts, I do not believe such a statement is a threat, much less is it a refusal to bargain. Farrell was stating the realities of the situation as he saw it—that it would not be worthwhile for him to seek work unless he could be competitive.

In paragraph 9(c) it is alleged that the Respondent bypassed the Union and dealt directly with employees when he demanded that employees who were not union officers execute the new contract. In fact, at the time, only one Association officer was still employed. The entire bargaining unit agreed to the new contract. Thus, even if this happened I do not find that it amounted to an 8(a)(5) unfair labor practice.

Further, that Pedon did not sign the renegotiated contract is at best a technical flaw and not an unfair labor practice. Farrell credibly testified that he did not know who the Association officers were, but he assumed that they were whoever held themselves out as the Association spokesmen. It further appears that no one had seen Pedon for some time. It is ludicrous to suggest that somehow Farrell was bound to deal only with a former employee, albeit one who still had some rights under the existing contract.

In fact, Farrell bargained collectively with the entire unit of employees and they reached an agreement. There is no evidence that Farrell attempted to avoid dealing with the employees' bargaining representative. Indeed, his dealing with employees was with the acquiescence of them all, including the only officer still employed. I therefore conclude that Farrell did not violate Section 8(a)(5) by proposing a modification of the collective-bargaining agreement or by bargaining with employees, *Chevron Oil Co*., 182 NLRB 445 (1970); or by reaching an agreement which was executed by three of the remaining seven unit employees and himself.

### B. *The Violations of Section 8(a)(1) Alleged in Case 4–CA–19573*

It is alleged in paragraph 6(a) of the complaint that on or about October 3, an employee was threatened with unspecified reprisals if he sought the assistance of the Association's attorney. The evidence in support of this allegation is the testimony of Steve Van Horn. He told Smalley that he had to go with Horne to see the Association's lawyer, to which Smalley ''informed me that he had put in a lot of hours—that like for trying to find work for me and that Jerry

[Farrell] would be upset that if—Jerry would become upset if we brought the Association lawyer into this situation.''

Smalley did not deny this took place. Thus, I must find he made the statement attributed to him. Such, I conclude, implies adverse consequences to the employees for using their lawyer and is violative of Section 8(a)(1). *Consolidated Casinos Corp*., 266 NLRB 988 (1983).

Similarly, it is alleged that on or about October 3, Smalley threatened an employee with plant closure if the Association sought the assistance of their attorney. The evidence in support of this allegation is the testimony of John Horne, who stated that after Smalley's statement to Van Horn, ''About an hour or so later, Mr. Smalley came over to me and told me that Steven Van Horn left that morning and went up to see the association's attorney, that Gerry [Farrell] was definitely going to close the plant.''

Smalley did not deny making this statement. I therefore find that he in fact threatened an employee with reprisals should employees seek the services of the Association's lawyer.

It is alleged in paragraph 6(c) that in late October or early November 1990, Smalley attempted to force employees to accept the Respondent's midterm modifications by telling ''an employee that another employee would be laid off, and that a laid off employee would not be brought back to work.'' The evidence of this allegation is certain testimony of William Wooters.

Wooters testified that Van Horn had received a layoff notice around October 30, which was canceled. Smalley approached Wooters and said there was work for 2 days in the Barclay 500 area and if Horne was interested, he could have it to which Wooters inquired about Van Horn. He told Smalley to be sure there was enough work for Van Horn before offering work to Horne. Smalley responded that Van Horn had enough work and was not going to be laid off. Then Wooters called Horne about the work in Barkley 500, which Horne accepted. Later in the day, Smalley told Wooters that Van Horn was going to be laid off. There followed a meeting of Wooters and Van Horn with Farrell, at which Wooters repeated what Smalley had said about Van Horn and the work for Horne. ''And Mr. Farrell told us that there must be some type of disagreement between him and Dave, that Dave should have never made that statement. He then told us that he was going to keep Steven on, on the job. He wasn't going to lay him off.''

To be discussed in more detail below, for at least a year and one-half the Respondent was having difficulty keeping its work force fully employed. Long term layoffs had resulted in nearly a two-thirds reduction the total number of employees. And when there were insufficient orders, employees were put on short term layoff. In this context, Smalley credibly testified that he expended much effort in attempting to find work so that employees would not have to be laid off.

Thus, even accepting as accurate the testimony of Wooters about the events of October 30, there is nothing to suggest that what Smalley told him was in any way an attempt to force employees to accept the Respondent's proposed modifications. The fact that two events happen at about the same time does not imply a causal connection between them. I conclude that Smalley's statements to Wooters on October 30 were not violative of Section 8(a)(1).

It is alleged in paragraph 6(d) that in mid-January 1991, Smalley told an employee he would be laid off and that another employee on layoff would not be brought back to work because the Association would not accept the Respondent's proposal. Again, the basis of this allegation is the testimony of Wooters.

As part of the agreement tentatively reached the Respondent agreed to a ''security clause'' by which it undertook to ''keep a minimum full time work force consisting of the 7 remaining employees at the time of the signing of the new agreement.'' The employees' attorney told them he thought this cause was unlawful and that if agreed to might make the Association liable to employees on layoff who still had recall rights.

Wooters told Smalley ''of the legal problem that had been presented to me,'' whereupon Smalley became ''upset'' and ''he said he wanted Steve Van Horn to—and told me that son of a bitch was not walking into the plant Monday morning.'' Wooters told Smalley he wanted to meet with Farrell about this and then later, according to Wooters, Smalley approached him at his machine and ''told me that he wanted me to produce X number of parts per hour on this particular job that I was working on. And he also told me that after this job was done he no longer had any work for me.''

Wooters did meet with Farrell and Farrell suggested they ''have the security agreement made up on a separate sheet of paper and kept off to the side, out of everyone else's view, that only the company and the employees knew was there.'' This was done.

Wooters' testimony was not denied by Smalley, and is accepted. The question is whether Smalley's reaction amounted to a violation of Section 8(a)(1) as alleged. I conclude that it did not. Wooters did not tell Smalley, as is alleged, that the Association would not accept the agreement. He merely stated that there was a legal problem, which was worked out when Wooters met with Farrell. I therefore conclude that there is no evidence in Wooters testimony of all the allegations in paragraph 6(d) and that the General Counsel did prove the violation.

It is alleged in paragraph 6(e) that on January 24, Smalley threatened employees with plant closure, told them a laid-off employee would not be recalled, interrogated them concerning internal processes of the Association, and threatened to report the Association to the Internal Revenue Service. It is alleged Smalley engaged in these acts in order to force the employees to accept the midterm modifications sought by the Respondent.

Again, the allegations are based on the testimony of Wooters. Wooters testified that ''he wanted to know how I became the union president or spokes-person. He wanted to see the union bylaws. He wanted to know where the union's money was and how it was being spent. Whether we were collecting interest on it and if we weren't. And if we were paying taxes on the interest and if we weren't paying taxes on it, he was going to report us to the IRS.'' Later, according to Wooters, Smalley made similar statements to assembled employees. Smalley did not deny the statements attributed to him by Wooters, and he admitted making some reference to the Internal Revenue Service, however, his testimony on this ended without resolution.

These statements amount to an impermissible inquiry into internal union affairs, and imply a threat. I therefore conclude, as alleged, that Smalley violated Section 8(a)(1).

In paragraph 7(a), in late October or early November 1990, Farrell is alleged to have impliedly threatened to lay off an employee and told employees that a laid-off employee would not be brought back to work, all in order to force the Association to accept his midterm modifications. The evidence of this is the testimony of Wooters about a meeting he had with Farrell: ''I told Gerry Farrell at that time that I would be willing to tell John Horn to put a hold on that grievance that he had about to go to the next level. If he didn't return as a good faith gesture, would consider bringing John Horn back to fill that position that was being filled by two employees, Mark and Darrel.'' [sic.] A few days later, Farrell responded, ''He told me that his good faith gesture was keeping Steve Van Horn on. Not bringing John Horn back.''

Farrell did not deny these statements, and I find they occurred in substance as testified to by Wooters. However, the General Counsel does not explain how they amount to a violation of Section 8(a)(1), nor is the case authority cited in point. The subject matter of these discussions was initiated by Wooters, and it was he who suggested making some kind of a deal with regard to the then layoff status of Horne. In this context, I do not conclude that Farrell's response was unlawful.

Wooters testified that in early January, Farrell spoke to him about getting the final points of the contract worked out. Wooters discussed this with employees, who said they would continue negotiating but only if Van Horn was recalled. Wooters transmitted this to Farrell, who said ''he would bring Steven Van Horn back to work after we had come to him and signed an agreement but not until.'' This is alleged in paragraph 7(b) as a violation of Section 8(a)(1). Farrell did not deny making this statement, and that he did is corroborated by the inclusion of Van Horn's recall in the side agreement signed by Farrell on January 25.

I conclude that a statement linking the employment of a bargaining unit member to the employees' acceptance of a new contract necessarily tends to interfere with their exercise of Section 7 rights, and is therefore violative of Section 8(a)(1).

### C. *The Violations of Section 8(a)(1) Alleged in Case 4–CA–20097*

In paragraph 5(a) it is alleged that Smalley threatened employees with discharge and layoff because they gave evidence to the Board in Case 4–CA–19573 and told an employee he would ''need God'' in order to be reinstated. The support for these allegations is in the testimony of Wooters.

Wooters testified that on the morning of May 9, Smalley told him that he and Van Horn were fired. Smalley told Wooters ''that he had seen my name and Steven Van Horn's name on the complaint filed by John Horn.'' But, according to Wooters, Smalley also said ''that he was no longer going to look any further for work for Steven Van Horn and myself. That once we're out of work that was it.'' Finally, ''He also to me that if John Horn felt that he was going to return to work at the plant, that he was going to need help from God.''

It seems inconsistent that Smalley would tell Wooters he was fired and then say he was not going to look for more work, implying that Wooters would continue to work until laid off. Nevertheless, Smalley did not deny making these statements. I find they occurred in substance as testified to by Wooters. And I conclude that by these statements, Smalley threatened employees because they were involved in filing a charge with the Board. He therefore violated Section 8(a)(1).

It is alleged in paragraph 5(b) that on May 23, 1991, Smalley told an employee that Farrell hated him and any other employee who had anything to do with the Association. The testimony concerning this is from Van Horn about an event occurring in early August 1991 when ''Dave told me Jerry hated me and anybody that had anything to do with the Association.'' Smalley did not deny making this statement.

No doubt an employer is privileged to hate unions and their adherents. The question is whether a gratuitous telling them so is violative of Section 8(a)(1), or is protected by Section 8(c). I conclude that such a statement, without some direct threat included, is not violative of the Act. *Central Broadcast Co*., 280 NLRB 501 (1986).

In paragraph 5(c) it is alleged that Smalley threatened an employee with discipline for not meeting production quotas because that employee gave testimony to the Board.

Van Horn testified that on July 22 Smalley ''took me into the office about wipers that were performed on the IAC machine and I believe also about a Teflon off my scanning machine. The times per part off the IAC machine were not fast enough.'' Van Horn acknowledged that this was true, but he said he was having problems with the machine. And, ''He said I could be suspended if that type of thing continued.''

While Van Horn stated that to be suspended was not the normal practice, and he had not been threatened before with discipline, he did admit that he had not made the times. He did not testify that is was normal for him not to make the times, or even that he had failed to do so before. On this minimal record, it appears that Van Horn admitted to some kind of malperformance in production for which Smalley said he could be disciplined if it continued. There is nothing in this to relate Smalley's threat to the Board charge some months earlier. Surely even with litigation pending before the Board, an employer has the right to manage its business, and can tell employees that continued substandard performance might result in discipline without violating the Act.

Finally, the General Counsel briefed, but did not allege as a violation, a statement by Smalley to Wooters that he ''would be history'' if he caused Smalley any trouble at the hearing. The General Counsel contends that this was a threat which can be found and remedied without having been alleged because it was ''fully litigated.'' I disagree. I believe the General Counsel must make some kind of reasonable effort to advise a respondent of all the allegations on which a remedial order is sought. Here, the Respondent was not so informed. There was no attempt to amend the complaint. And the only litigation of the issue was the testimony of Wooters. That a Respondent appearing pro se did not object to the testimony hardly qualifies as waiving his right to have the matter formally alleged. Cf. *Central Broadcast Co*., supra. I therefore conclude that no violation should be found concerning this statement by Smalley. *Bouley*, 306 NLRB 385 (1992).

D. *The Allegations of Discriminatory Layoffs and Change of Working Conditions*

It is alleged that to force the Association to accept its midterm contract modifications, the Respondent laid off Horne twice (August 23 and September 17), Wooters twice (September 17 and December 17), Van Horn twice (September and December 17), and once each: Jim Rafine, Creighton Richardson, Thomas Gaskill, David Thorpe, and Eric Wells (December 17).

The General Counsel argues that a prima facie case of discrimination in violation of Section 8(a)(3) was made because these layoffs occurred during the time the Respondent and the employees were negotiating and that a layoff notice was given to Horne 20 days in advance (just before he started on vacation).

Given the total factual situation here, I conclude that the General Counsel did not make out a prima facie case. To establish an unlawful motivation, there must be more than proximity in time between two events. Here, the General Counsel established that the Respondent wanted to modify the collective-bargaining agreement and the employees agreed to do so. The General Counsel also established that during the period of negotiations there were periodic layoffs of employees. There is, however, no evidence which would tend to suggest that somehow the Respondent either retaliated against employees or sought to gain some advantage. Nor is there evidence of animus toward the employees or the Association. Indeed, Farrell ultimately agreed to the same wage increase for 1991 as was in the previous contract and he agreed to a wage increase for 1992. I conclude there is insufficient basis to infer that protected conduct was the motivating factor in these layoffs. See *Mistletoe Express Sevice*, 295 NLRB 273 (1991).

But even if a prima facie case was established, the Respondent proved that the layoffs would have occurred even absent the negotiations. It was the economic condition of the Company which precipitated Farrell's desire for an amended contract and which had caused a substantial reduction in the work force since at least early 1989.

The layoffs alleged as violative were short term, and were a result of lack of work. Given the then small work force, it is reasonable that all or almost all of them would be affected. The General Counsel did not dispute that the Respondent was having difficulty finding work for all its employees. Nor did the employee witnesses. Wooters testified that the Company would try to move employees around, but would lay them off when there was no work.

The record is sometimes confusing on how a particular employee was selected for layoff. It appears accepted by the employees that availability of work on a particular machine was the controlling factor, notwithstanding a contract provision providing for department seniority. The Respondent may well not have precisely followed the contract in all instances; however, this fact does not make a lawful layoff unlawful.

Even with the 8(a)(1) activity found, I cannot conclude there was an attempt to lay off particular individuals in order to force employees to agree to the contract. Further, at one time or another, each member of the bargaining unit was laid off. The evidence is just too nebulous to support a finding of 8(a)(3) violations in the layoffs.

Similarly, in Case 4–CA–20097 it is alleged that the Respondent violated Section 8(a)(3) and (4) when Van Horn was laid off on May 20, 1991, on May 23 when his working conditions were changed such that he was subjected to closer supervision, and on September 10 when he was laid off.

It is also alleged that Wooters' working conditions were changed on June 21 by subjecting him to closer supervision in violation of Section 8(a)(3) and (4).

As with other layoff notices, the one given Van Horn for May 20 was canceled. Smalley credibly testified that since the contract required a 3-day notice for a layoff, sometimes notices were given because it was anticipated there would be no work, but canceled if work came in. The situation as to Van Horn in May was no different from past events. Therefore, I conclude there is insufficient evidence in this to find a violation of the Act.

Counsel argues that Van Horn's September layoff was ''suspect.'' Such, however, does not prove there was a violation of the Act. Although a junior employee continued to work during Van Horn's layoff, and even had some overtime, unquestionably layoffs were occasioned by the work available on particular machines and each employee operated a different one. There is no evidence to suggest that there was in fact work available on Van Horn's machine during the time of this layoff. The fact that Van Horn may have been able to do someone else's work does not establish an unlawful motive. I therefore, conclude that the General Counsel failed to establish that this layoff was violative of the Act.

The alleged change of working conditions is, however, another matter. Smalley required Wooters and Van Horn to adhere to more rigorous production quotas and both were long term, competent employees. Both were instrumental in the Board charges. As to this allegation, I conclude that the General Counsel did establish a prima facie case which the Respondent had the burden to rebut. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). Given the absence of any justification for the increased scrutiny of their production, I conclude that the Respondent violated Section 8(a)(3) and (4) of the Act.

E. *Conclusions*

On the record as a whole, I conclude that the Respondent did not violate Section 8(a)(5) in proposing the midterm modification of the contract nor Section 8(a)(3) or (4) with periodic layoffs of employees. The Respondent did violate Section 8(a)(1) by certain statements of Smalley and Section 8(a)(4) with the increased scrutiny of Wooters and Van Horn. Therefore, I recommend that these cases be dismissed except as to those violations found and that the Board adopt the following.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Harper Packing Company, Inc., Bridgeport, New Jersey, its officers, agents, successors, and assigns, shall

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Interfering with the right of employees to seek legal counsel.

(b) Inquiring into the internal affairs of the employees' Association.

(c) Threatening employees with plant closure and layoff.

(d) Linking an employee's recall from layoff to acceptance by the employees of a collective-bargaining agreement.

(e) Changing employees working conditions because they gave testimony to the Board.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the change of working conditions initiated for Van Horn and Wooters whereby their production was subjected to closer scrutiny.

(b) Post at its Bridgeport, New Jersey facility copies of the attached notice marked ''Appendix A.''[5] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''